



Testimony of Rep. Sheryl Albers on Assembly Bill 479 for
the Assembly Committee on Judiciary & Ethics
September 6, 2007

Thank you Chairman Gundrum and committee members for holding a public hearing on AB 479. I introduced a similar bill last session that ultimately was approved by this committee with changes and nearly came up for a floor vote in the Assembly. AB 479 incorporates the changes which were brought to my attention by colleagues in advance of the bill being calendared for floor consideration.

Last session, at hearing, I circulated to committee members the informational brochure entitled *Who's Who of Citizen-Based Monitoring in Wisconsin*. One of the jobs of these volunteers do is gather information for the DNR as to endangered species sightings in this state. As you may be aware, monitors, primarily volunteers, report sightings of species alleged to be endangered (plant and animal). This information comes to be written down either by the volunteer or by DNR-staff, which is then kept on file by the DNR for use, as the need may arise for the information, such as when a property owner seeks permission to construct some type of improvement in the vicinity of where a sighting was known to have occurred. Compiled sighting information is also used to:

1. Designate a parcel of land as property which the state has an interest in acquiring;
2. Designating a parcel as having "protected" status, which can occur after the state acquires property, or during an exercise to designate certain areas as a certain type, during a comprehensive planning process;
3. Introduce as evidence at an administrative hearings where an individual-property owner has appealed denial of a permit;

4. Consider by some Board of Adjustment/Planning Commission hearings as grounds to justify denial, or to preclude a change in use that was requested, or variance was sought.
5. Close or restrict areas from general – open public use.

The credibility and or validity of this information is suspect simply because it did not necessarily come to be compiled by an "expert". Much like an occasional or one-time-sighting of the Loch Ness Monster by a local resident-farmer, or a UFO sighting, there remains some doubt as to whether the information contained on a report is inaccurate or reliable. Reports may be lacking a date, a signature or substantiation by others.

However, an individual who owns the land on which the sighting allegedly occurred would receive no information as to the sighting on their property after it was reported. Therefore, a landowner's ability to challenge the veracity of the monitor or the reliability of a report typically does not occur until presented as evidence at an administrative hearing.

Such challenges by a property owner are generally unsuccessful simply because such monitors are protected under the law as "tipsters" and may remain anonymous. Tipsters cannot not be subpoenaed or questioned, directly or indirectly, at any hearing or prior thereto. Nonetheless information that tipsters supply are frequently used against a landowner who seeks to use their property for a purpose that requires that a permit be granted first by the unit of government. Use can be denied and has been denied on the basis of reported sighting of certain species, even though testimony or evidence presented was presented by DNR-staff, even though the date on the report may be antiquated, and even though the reporter/monitor/volunteer was not present and could not be questioned or subpoenaed.

At administrative hearings most anything can be submitted, from expert testimony by credentialed professionals to even hearsay by a third party. Nearly every piece of information is accepted and received into the hearing.

record, with general evidence rules applicable at trial not applicable here. This is because Administrative Law Judges (ALJ) have broad discretion in assessing credibility and assessing weight to various pieces of information and evidence presented.

In a civil or criminal court proceeding, however, much of the evidence gleaned at an administrative hearing would be open to objection and disqualification. For example, information supplied by a third party not attested to or not available to be questioned may be given less weight than a person who is present to testify and be questioned. Hearsay as to what someone else said is generally inadmissible and thus not afforded any weight, but may be afforded some weight if also substantiated by other's testimony or if said by someone who is deceased or otherwise not available to subject themselves to questioning. Court rules allow a judge to first consider reliability of the information.

Even if a volunteer monitor was engaged in a violation of law, such as trespass, at the time the sighting occurred, which subsequently came to be reported, though illegal conduct, the information is not kept out of the administrative hearing record.

To the reasonable person, it would seem unfair that a person engaged in an illegal act when gathering information can ultimately use information gathered during that act against a property owner at any point in time in the future. And, it doesn't seem fair that the property owner essentially has no right to question or cross examine the person or persons who filed these reports. The judicial system is designed to allow for questioning of a person who provides information to the judge or the jury. However, the statutes, codes, and internal guidelines of the DNR and those related to hearings by ALJ's allow no inquiry of those individuals who are charged with maintaining this information, or of those who gathered the information. Such information is not subject to open records laws. Sightings' reports are afforded the same confidentiality that health care records are afforded under the health care privacy act to individuals.

All too frequently, property development is halted based upon a single reported sighting of an endangered species. A property owner so affected has no guaranteed right to challenge the information at hearing, and no guaranteed right to challenge the information as it came to be recorded at the DNR. Thus, a property owner has no rights to question their "accuser" who here would be the monitor who filed a report as to their sighting.

In the September 2005 Issue of the *Wisconsin Lawyer*, in an article titled: Hearsay in Administrative Hearings, the Supreme Court held in a decision announced February 23, 2005, *Gehin v. Wisconsin Group Health Insurance Board*, that certain evidence offered during administrative hearings which is contested *must* be excluded by an ALJ, if the expert who presented the writing is not available to be questioned. This new guideline handed down by the Supreme Court applies only to certain written documents submitted as evidence, and while it applied to a medical-decision and evidence presented in writing by a doctor, the same underlying rationale given by the Court is applicable here.

This rule should be applied consistently by ALJs at all types of hearings, simply because the type of issue under consideration is irrelevant. This change, if written into statute, will provide a small measure of protection at administrative hearings to all individuals, whether represented or pro se, because once an expert supplies written information the contesting party will have a right to question the expert, or if the expert is not available to be questioned, the information may be deemed of no relevance or of less weight.

This ruling, in and of itself, does not protect a property owner who finds his or herself in front of an AJL on a DNR-related or other land use matter where one or more endangered species are the root of the problem, because current law does not allow for the disclosure of tipsters. Therefore, the law change I've proposed is needed in order to overcome this advantage the state has over property owners. The goal here is to level the playing field.

As you may be aware, many individuals appear at administrative hearings without counsel (*pro se*). The average citizen appearing without counsel is not going to understand in advance that they should have brought an expert with them to challenge written information submitted by a state agency to keep it out of the hearing record. The change contained in this bill draft, will allow a written report of a sighting to be challenged, but only by a suitable expert, and that expert will need to appear in person, so that they too, can be subject to questioning. Any individuals who appear *pro se* will be at a disadvantage simply because the DNR is likely to have one or more experts, or one or more attorneys present.

Use of photos taken by monitors, anonymously, by tipsters, kept of record by the DNR may continue to be problematic for a property owner seeking a change in use, but to protect rights of property owners, AB 479 proposes a new standard for evidence in administrative hearings like that which the Supreme Court advanced in 2005. The bill provides no guaranteed remedy for such circumstances.

This bill does, however, specify when third-party anonymous informant information will be admissible. If information cannot be verified or if the person reporting is not available (deceased/moved) or otherwise cannot be questioned, such information must be excluded from the hearing record. This standard would be in sync with the Supreme Court's 2005 holding.

Simply, AB 479 provides that evidence of the discovery of an endangered or threatened species by an individual while on the private property of another is not admissible during the course of a civil, criminal, legislative, or administrative proceeding unless certain conditions apply. Evidence will continue to be admissible if the individual who made the discovery gave notice to the property owner by certified mail at least 48 hours before entering the property that he or she intended to enter the property. The bill requires that notice to the property owner be dated in a manner that shows that it was mailed at least seven days before the person entered the property.

Two objectives will be met if AB 479 becomes law. First, administrative judges will have a clear understanding as to what is not acceptable and what is acceptable in terms of evidence which comes to be presented for review at administrative hearings. Consistent application is essential for hearings to be fair and just. Secondly, disrespect and disregard for property owners' rights will cease, as wrongful entry will no longer be encouraged.

On behalf of property owners I encourage you to support its passage.

Thank you.